MEMORANDUM OF LAW

DATE: August 19, 1993

TO: Lucille M. Goodman, Property Department

FROM: City Attorney

SUBJECT: Del Dios Mutual Water Company - City's Desire to Obtain Water Supply for Proposed Development

By memorandum dated March 28, 1993, you asked whether there was any legal recourse available to The City of San Diego ("City") to compel the Del Dios Mutual Water Company ("Mutual Company") to provide water service to 107 proposed subdivision lots owned by the City's Water Utility. The lots, each about 20,000 square feet in size, are located in an unincorporated area of the County, in the San Dieguito River--Lake Hodges watershed. The Water Utility is interested in developing these lots, but the present lack of a potable water supply presents an obstacle to that intent. Apparently, the Mutual Company is the only purveyor of water in the Del Dios area, and is the source upon which development is practically dependent.

In an April 17, 1993 letter to the City's Property Director (copy attached), the president of the Mutual Company in effect states that following discussion by the Del Dios town council, the Company will only be able (or willing) to supply "12 to 15 additional AVERAGE size residences." Various reasons were given for why the Mutual Company would only be able to supply so few of the 107 lots. Chief among those reasons was the concern for a very limited supply which must be shared among existing Company members. Also, an explanation was given that caution is necessary to prevent the lowering of groundwater tables even further below their already "dangerously low levels." You have mentioned some ancillary issues pertaining to the proposed development, having to do with plans for sewage disposal facilities, but these are not addressed here, as your principal question simply asks: What legal action, if any, can be taken to compel the Mutual Company to supply water to all 107 lots?

The answer, in probability, is that nothing can be done unless the City can establish a right to join the Mutual Company by virtue of the location of its lots. This is due to the legal

status of the Mutual Company. A mutual water company under statutory law is different only in name from a private water company. Mutual water companies usually involve the transfer to the company of water rights by landowners who in turn are issued securities that represent their rights to water appurtenant or not appurtenant to their land. Consolidated People's Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 63 (1928); Rogers & Nichols, Water for California, Section 673 (1967). A mutual water company is usually formed by an association of landowners who convey their water rights to the corporation and furnish moneys to secure and distribute waters to their lands. Id.; Arroyo Ditch and Water Co. v. Dorman, 137 Cal. 611 (1902). Thus, mutual water companies are essentially private corporations, and in reference to your question, the City's position must be regarded as being the same as it would be in any other instance where it might seek to do business with a private company. That is, the City generally is not in a position to compel a private enterprise to do business with it.

Mutual companies are typically formed by and for the benefit of their owners, or to put it differently, the shareholding owners are usually their own exclusive customers. Ownership of mutual water companies can be represented either by shares or by membership certificates. Civil Code Section 330.25; Corporations Code Section 9607. In order to have an interest in a mutual company's water ┌or water rights - See Locke v. Yorba Irrigation Co. 35 Cal. 2d 205, 209-10 (1950)σ, one typically must own shares or certificates in the company. Although consumer's rights in a private water company can also be established by contract ┌Stratton v. Railroad Commission, 186 Cal. 119, 121-23 (1920)σ, this is a common distinction between private and mutual companies. Where private companies may have the objective of marketing through contracts outside of the corporate ownership, private mutual companies usually exist for what the name suggests, the mutual benefit of distributing water among company owners according to shares. Since the Mutual Company has stated it would likely agree to supply 12 to 15 of the 107 lots, this would be accomplished by issuance or transfer of shares. An important fact is stated in the letter from the Del Dios president where he says "we have not expanded our system nor issued water shares outside the confines of Del Dios." This indicates that the City may be in a position to argue that the Mutual Company must allow all Del Dios landowners to join.

If the City's 107 proposed lots are within the confines of Del Dios, there is a possibility that the City could compel the Mutual Company to issue shares. This will depend on the Mutual

Company's articles of incorporation and bylaws, which we have not yet examined. It is possible that the articles and bylaws may provide that the water rights of landowners within a specific geographic area are entitled to purchase shares upon transfer of appurtenant or nonappurtenant water rights to the Mutual Company. The City's lots themselves have water rights, assumably, and it might therefore be entitled under the articles and bylaws to purchase shares. Other limitations may exist though, depending on whether the Mutual Company is restricted by those articles and bylaws from issuing more than a certain number of shares, or whether supply constraints may exist. In any event, if the City is entitled to membership and there is sufficient supply available, it would have to pay the cost of expanding the Mutual Company's system to accommodate the new load. See Duze v. South Elsinore Mutual Water Co., 83 Cal. App. 2d 333, 335-336 (1948)

Another possible argument to consider is whether the Mutual Company is subject to regulation as a public utility by the Public Utilities Commission (formerly the Railroad Commission), although this argument is unlikely to be successful. Public Utilities Code Section 2705 provides in substance that any association or corporation which sells water only to its own members or to public agencies or mutual water companies at cost (i.e., without profit) is not a public utility and is not subject to regulation by the Public Utilities Commission.

Case law is in accord. A mutual water company is not a public utility subject to the jurisdiction of the Public Utilities Commission unless its water has been dedicated to a public use. Stratton v. Railroad Commission, 186 Cal. at 122, 123; Mound Water Co. v. Southern California Edison Co., 184 Cal. 602, 611-12 (1921); Riverside Land Co. v. Jarvis, 174 Cal. 316, 324 (1917) (mutual company can dedicate water to public use). Here, a question of fact is raised for which we presently have insufficient information to answer. If the Mutual Company had ever dedicated its water to public use, the argument that the Public Utilities Commission has jurisdiction over the issue may be viable, although it is unlikely that a public use dedication has been made.

There is no dedication of water to a public use where it is sold only in fulfillment of private contracts with particular persons to supply water to specific parcels of land, or where it is sold in gross to mutual companies. Thayer v. California Development Co., 164 Cal. 117, 129-31 (1912); Franscioni v. Soledad Land and Water Co., 170 Cal. 221, 225-27 (1915). One case that comes very close to being squarely on point to your question is Escondido Mutual Water Co. v. Escondido, 169 Cal. 772

(1915). There, the Escondido Mutual Water Company was held to be without any public duty to the City of Escondido to supply that city, which was one of its stockholders, with water in excess of the proportionate amount to which the city was entitled as a stockholder. The only water that the mutual company had ever voluntarily furnished to the city was the proportionate share the city was entitled to as a stockholder, so there was no finding of a dedication to public use. Id. at 777. Thus, in the final analysis, the question whether water has been dedicated to public use is a question of fact.

A general offer to sell water to anyone who wants to buy it, and an acceptance of such an offer, has been held to be a public use dedication. Traber v. Railroad Commission, 183 Cal. 304, 312-13 (1920). Similar offers to sell within a specific service area could support a finding of a public use dedication. Samuel Edwards Associates v. Railroad Commission, 196 Cal. 62, 70 (1925). Sales of water to the public in accord with avowed purposes of the seller's articles of incorporation, or sales pursuant to contracts stipulating that water was to be supplied at prices "as may be fixed by law," have also been held to be sales under public dedication. Williamson v. Railroad Commission, 193 Cal. 22, 29-30 (1924); Palermo Land and Water Co. v. Railroad Commission, 173 Cal. 380, 384 (1916). These are some of the factual inquiries which must be made regarding the water sales of the Mutual Company in order to ascertain if it has dedicated water to public use. Our conjecture is that the Mutual Company has not dedicated its water to public use, but this could be more fully investigated.

Regardless, even in the unlikely event that the City could establish the jurisdiction of the Public Utilities Commission, there would still remain the burden of convincing the Commission that it should order the Mutual Company to supply all the City's lots. This might prove difficult under the circumstances, where the City's motive is to gain revenue through development of the lots, and where there seems to be local opposition to the scale of the proposed development, which is based on a perhaps very true contention that there simply is not enough water to supply all those lots without adversely impacting existing uses or the stability of the groundwater level. The force of argument would also be weakened by the fact that despite whatever public use dedication might be proved, one thing is certain in that the 107 lots are not an existing supply use to which a dedication could have been made.

One other approach to your question might be considered concerning the possibility of condemnation. This also does not

appear to be a strong prospect. Power of eminent domain can be exercised by any person or organization authorized by statute to acquire property for public use. Code of Civil Procedure Section 1240.020. This includes water rights too (Water Code Sections 11581 - 11591), and applies to municipalities, corporations supplying water to the public, public utilities, or any other organizations furnishing water for public use. San Joaquin and Kings River Canal and Irrigation Co. v. Stevinson, 164 Cal. 221, 226-235 (1925).

However, there are complications to the present situation that would make it difficult for the City to exercise eminent domain over the Del Dios water rights. First, the lots are extraterritorial to the City. A local public entity may acquire by eminent domain only property within its own territorial limits except where the power to acquire eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers. Code of Civil Procedure Section 1240.050. "There is no constitutional objection to condemnation by a municipal corporation of property wholly outside its corporate limits, if the condemnation has the purpose of serving its inhabitants." City of Hawthorne v. Peebles, 166 Cal. App. 2d 758, 760 (1959); Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co., 72 Cal. App. 2d 638, 652 (1946). However, it could be argued that condemnation of the Del Dios water rights would have no benefit to the inhabitants of San Diego (other than Water Utility revenue) and thus, that the condition precedent to extraterritorial condemnation is not satisfied. While economic considerations alone may not be sufficient to justify extraterritorial condemnation, considerations of economy may be taken into account in determining necessity. Id., at 654-655. Here again the question of necessity would be one of fact.

Even if the City could establish an express or implied right to extraterritorial condemnation, a further constraint exists in that the required resolution of necessity is not conclusive where the property to be taken is outside the City's boundaries. Code of Civil Procedure Sections 1240.040, 1245.250(b); City of Hawthorne v. Peebles, 166 Cal. App. 2d at 769; City of Los Angeles v. Keck, 14 Cal. App. 3d 920 (1971). Thus, if the City desired to condemn a water supply for its 107 lots, its resolution to do so would carry a presumption of necessity, but could nonetheless be challenged in court as a justiciable issue, and the City would have the burden of proving necessity. This could be difficult, as the need to develop 107 lots could become a highly contested issue.

Moreover, one other limitation on the power of eminent domain exists under the established rule that a taking for public use can be refused where the power is sought to be exercised against private water rights when private users would have to obtain the same water from the public use utilities or a municipality. City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 921 (1949), cert. den. 339 U.S. 937 (1950). While the extent of condemnation that would be necessary to supply the 107 lots has not been stated, there is a strong possibility that this use, whatever it may be, would force the existing private users to obtain water elsewhere. Eminent domain cannot be exercised if the existing Mutual Company members would be forced to go to public sources to obtain water. Whether the water rights of the existing Mutual Company are sufficient to supply both its members and the extra 107 lots might also be a contested question. The Mutual Company has already taken the position that there is not enough water to supply the 107 lots, and the validity of this position should be carefully determined and considered. For whatever merit that statement has, the City's prospect of condemnation would be diminished.

In conclusion, aside from the fact that we have not yet examined the Mutual Company's articles and bylaws, your question presents a problem that probably would not be best addressed through legal action. Instead, a cooperative approach would likely have a greater chance of obtaining results more satisfactory to the City. We recommend continued negotiation with the Mutual Company, which may ultimately agree to supply more lots if the consideration and limitations offered in return are attractive enough to outweigh the concerns opposed to selling the City water rights to allow additional development. It also would be helpful to develop the facts regarding the water rights appurtenant to the City's own lots, in order to determine if joining the Mutual Company is a viable option.

And finally, as an ironic postscript, attached is a Memorandum of Law dated June 14, 1954 by then Assistant City Attorney Shelley J. Higgins, which came up during research of your question. The memorandum shows the table has turned. In 1954, it was the Mutual Company that had lots it wished to develop, but could not get permits from the Health Department because the lots would be in the floodway of Lake Hodges in the event the City, which had just bought land to increase the size of the reservoir, raised the dam. It was then advised that the City had no legal liability to the Mutual Company for any economic loss caused by the inability to develop the property. Now, nearly forty years later, it is the City that wishes to

develop its lots, and it is the probable case that the Mutual Company is without obligation to supply the water upon which that development depends.

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Attachments
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